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money, even though in so doing it would probably go beyond the doctrine of *Savage* v. *Mason*, 3 Cush. 500. There, the covenant was to pay for the privilege of using a party wall, and was connected, it would seem, with the enjoyment of an easement, in this case, a right to retain the wall on land of the covenantor and his assigns.

WAIVER OF CONSTITUTIONAL RIGHT TO TWELVE JURORS. — The Supreme Court of New Mexico has just decided that the United States constitutional guaranty of a jury trial in all criminal prosecutions cannot be waived by one indicted for a felony, so as to make valid a trial by eleven jurors. *Territory* v. *Ortiz*, 42 Pac. Rep. 87.

Most of the American State constitutions contain similar guaranties, which have been generally interpreted to prohibit statutes compelling the defendant to submit to trial by any number of jurors less than twelve. As regards the defendant's ability to waive this right, the authorities are divided. Although in minor offences the defendant is generally allowed to waive the right even in the absence of statutes permitting it, he is not allowed at common law to waive the right in case of felonies; and statutes permitting waiver of the right in such case are in some States held unconstitutional. Nowhere is waiver of this right permitted in capital cases.

One argument suggested against allowing the defendant to waive his constitutional right to a trial by a full panel has been that the State is concerned to preserve the lives and liberties of its citizens, and therefore it will not suffer them to consent to a form of procedure that may lessen their chances of acquittal. *Cancemi* v. *People*, 18 N. Y. 128. But in *Comm.* v. *Dailey*, 12 Cush. 80, Chief Justice Shaw points out that in any particular case the defendant's chances of success in a present trial with eleven jurors may be greater than in a future one with twelve, as where certain evidence is now available that may not be in the future; and that the defendant and his counsel can be safely trusted not to prejudice his interests. Judge Cooley contends, however, upon better ground, that a tribunal of less than twelve jurors is unknown to the law; that it amounts merely to a species of arbitration to decide whether the accused has been guilty of an offence against the State. Cooley, Const. Lim. (6th ed.) 391. The finding of such a tribunal, not constituted according to law, is of course shorn of legal effect. Bulwarked by this reasoning, the result of the principal case and kindred decisions seems fairly impregnable.

THE NATURE OF RAILROAD TICKETS. — Two recent cases in minor courts bring up interesting questions concerning the nature of railroad tickets. In *Evansville & T. H. R. R. Co.* v. *Cates*, 41 N. E. Rep. 712, the Appellate Court of Indiana held that where a passenger demands and pays for a ticket to A, and by a mistake of the ticket agent is given a ticket to B only, with which he enters the train without noticing the error, he has a right to ride to A on making proper explanation to the conductor; and can recover from the company for ejection by the conductor at B. This case is not without support (see *Georgia R. R., &c., Co.* v. *Dougherty*, 86 Ga. 744; 3 Wood on Railroads, § 349); but the weight of authority is against it, and it seems to have no foundation in principle. It involves a misconception of the true character of a railroad ticket. If it were true that the

passenger made his contract with the ticket agent and the ticket was handed over merely as a receipt, then he would perhaps have had a contract right to be carried to his intended destination. But, as was pointed out in 1 HARVARD LAW REVIEW, 17, the ticket agent has no authority to make contracts, — his duty is merely to sell tickets. The ticket is the contract, and by its terms the passenger is bound; and in a case like that under discussion, while he doubtless has a right of action against the company for selling him the wrong contract, he has no action for being put off the train at the terminus provided by that contract.

Courts have fallen into error, it would appear, from failure to distinguish between the case of a ticket which is, on its face, not good for the journey intended by the passenger, and that of a ticket which is apparently good for the intended journey, and declared to be so by the ticket agent, although by the regulations of the company it is in fact not good. In the latter case the contract is ambiguous, and the passenger, under the circumstances, surely has a right to insist on the interpretation given by the company's agent; but that is no reason why he is not bound by the ticket in the former case, where the interpretation of the contract is perfectly clear. (See Hutchinson on Carriers, § 580, *f*.)

The analogy between railroad tickets and bills and notes has often been remarked, and is treated of at length in the article in the HARVARD LAW REVIEW referred to above. A ticket is not a consensual but a formal contract; and although assignable in the absence of words of limitation, it is, like other negotiable instruments, not assignable in part. The second of the two recent cases is of note in this connection. In *Curlander* v. *Pullman Palace Car Co.*, a case decided in the Superior Court of Baltimore, and reported in 28 Chicago Legal News, 68, the novel question was raised as to the right of a purchaser of a sleeping car section, who leaves the train before reaching his destination, to transfer the use of the section to another passenger for the rest of the journey. The court held that he had that right. This decision can apparently be supported only on the ground that a sleeping car ticket is radically different from a railroad ticket; that it is not a formal contract of transportation, but rather evidence of the purchase of certain space in the sleeping car for the specified journey. The existence of so marked a distinction between the two sorts of ticket may well be doubted.

THE RIGHT TO PRIVACY — THE SCHUYLER INJUNCTION. — The case of *Schuyler* v. *Curtis*, before noticed in its earliest stage in 5 HARVARD LAW REVIEW, 148, has been finally adjudicated by the Court of Appeals of New York in favor of the defendant. The bill was for an injunction to prevent the defendants from completing a statue of a deceased lady of whom the plaintiff was the nephew and step-son, and from displaying it first at the World's Fair under the title of "The Typical Philanthropist," and then in the rooms of the Ladies' Art Association in New York. Mr. Justice Peckham in dismissing the bill took especial care to say that the decision could not be taken as a denial of the right to privacy, or of that altogether independent right which the next of kin of a deceased person might have in the privacy of that person's past life, and he put the decision upon the ground that in the case in question there were no circumstances which gave the plaintiff good reason to pray for an injunction. The reasoning was that the deceased could not have shrunk from the anticipation of a publicity after her